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No. 81-1958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,

Petitioner,

v.

MID LOUISIANA GAS COMPANY, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE OF MID LOUISIANA GAS COMPANY TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

Alan C. Wolf
Vice President and
Corporate Counsel
Mid Louisiana Gas Company
Lykes Center, 21st Floor
300 Poydras Street
New Orleans, Louisiana 70130
(504) 581-5722

George W. McHenry, Jr.*
McHenry & Staffier, P.C.
1300 19th Street, N.W.
Suite 408
Washington, D.C. 20036
(202) 467-5880

Attorneys for
Mid Louisiana Gas Company

*Counsel of Record

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Pursuant to Rule 42.4 of the Rules of the Supreme Court, Mid Louisiana Gas Company ("Mid Louisiana") hereby responds to the motion filed by Arizona Electric Power Cooperative, Inc. ("AEPCO") on April 22, 1982, requesting that the Court simultaneously consider at the same conference (1) the petition for certiorari filed in this case, seeking review of a decision of the United States Court of Appeals for the Fifth Circuit in Mid Louisiana Gas Company v. FERC, 664 F.2d 530 (5th Cir. 1981), and (2) the petition for certiorari filed in Pennzoil Company v. Public Service Commission of West Virginia, Docket No. 81-1672, seeking review of an unreported order issued by the Supreme Court of Appeals of the State of West Virginia on December 10, 1981, in Pennzoil Company v. The Public

Service Commission of West Virginia, Case No. 80-175-G-42T. 1/ In that motion, AEPCO alleges that the decision of the Fifth Circuit and the order of the Supreme Court of Appeals of West Virginia are in direct conflict on an important question, specifically, the meaning of "first sale" as used in Section 2(21) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. 3301, et seq. AEPCO also suggests that it would be appropriate for the Court to summarily reverse the Fifth Circuit's decision in Mid Louisiana and summarily affirm the West Virginia Supreme Court of Appeals' order in Pennzoil.

In response to AEPCO's motion, Mid Louisiana submits the following:

1. Since Mid Louisiana is not a party to the Pennzoil proceeding, it takes no position on the appropriate timing for disposition of the petition for certiorari in that case. Mid Louisiana strongly disagrees, however, with AEPCO's assertion that there is a direct and irreconcilable conflict between the decision of the Fifth Circuit in Mid Louisiana and the order of the West Virginia Supreme Court of Appeals in Pennzoil. The one page order in the Pennzoil case is nothing more than a simple denial of a petition filed by Pennzoil Company seeking review of a decision of the Public Service Commission of West Virginia. 2/ Contrary to AEPCO's assertion (Motion at 2), the order does not expressly adopt, as a basis for the Court's decision, the orders of the Federal Energy Regulatory Commission ("FERC") which were vacated in the Mid Louisiana case. Indeed, the order makes no mention whatsoever of either the NGPA or the FERC's interpretation of the act. Nor does it set forth the reasons for denying Pennzoil's petition for review. Under these circumstances, it is

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1/ Mid Louisiana Gas Company is a wholly-owned subsidiary of Celeron Corporation (formerly Central Louisiana Energy Corporation). In addition, Mid Louisiana is an affiliate of South Louisiana Production Company, Inc., Louisiana Intrastate Gas Corporation, Trans Louisiana Gas Company, Inc., and LIG Chemical Company.

2/ See Appendix A to Pennzoil Company's petition for certiorari in Pennzoil Company v. Public Service Commission of West Virginia, No. 81-1672.

mere conjecture to conclude that the West Virginia Supreme Court of Appeals has interpreted "first sale", as used in the NGPA, in a manner which necessarily and irreconcilably conflicts with the decision of the Fifth Circuit. As the Public Service Commission of West Virginia has indicated in its brief in opposition in the Pennzoil case and its response to AEPCO's motion in this docket, the Court could have denied Pennzoil's petition for appeal on several grounds which are unrelated to the NGPA definition of "first sale". 3/ For example, the Court's disposition may have been based upon (1) a belief that states retain jurisdiction under Section 602 of the NGPA, 15 U.S.C. 3432, to establish maximum prices for in-state production which are less than the maximum NGPA ceiling prices; (2) a failure of Pennzoil to exhaust its administrative remedies; or (3) a failure by Pennzoil to show that the Public Service Commission's overall rate determination was improper under the Court's standards for review. 4/ It is thus clear that there is no direct and unavoidable conflict between the decision of the Fifth Circuit in the Mid Louisiana case and the order of the West Virginia Supreme Court of Appeals in the Pennzoil case.

2. In any event, as Mid Louisiana will demonstrate more fully in its brief in opposition to AEPCO's petition, there is no basis for the Court to grant a writ of certiorari and summarily reverse the Mid Louisiana decision. A brief review of that decision reflects that the Court of Appeals for the Fifth Circuit carefully analyzed the law and applied the correct principles of statutory construction in determining that the NGPA incentive ceiling prices are to be applied on a non-discriminatory basis to production of natural gas by interstate natural gas pipeline companies.

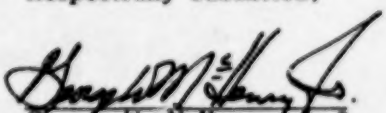
3/ See p. 2 of Response of Public Service Commission of West Virginia to the Motion of Arizona Electric Power Cooperation, Inc. For Contemporaneous Consideration and Disposition of Petitions For Certiorari, filed in this docket on April 29, 1982.

4/ See p. 8 of Brief of Public Service in this docket on Commission of West Virginia In Opposition to Petition, filed in Docket No. 81-1672 on April 9, 1982.

CONCLUSION

In view of the foregoing, Mid Louisiana submits that contemporaneous consideration and disposition of the petitions for certiorari in the Mid Louisiana and Pennzoil cases is not required. In any event, AEPCO's motion should be denied to the extent it requests summary reversal of the Fifth Cicuit's decision in Mid Louisiana.

Respectfully submitted,



George W. McHenry, Jr.*
McHenry & Staffier, P.C.
1300 19th Street, N.W.
Suite 408
Washington, D.C. 20036
(202) 467-5880

Alan C. Wolf
Vice President and
Corporate Counsel
Mid Louisiana Gas Company
Lykes Center, 21st Floor
New Orleans, Louisiana 70130
(504) 581-5722

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May 5, 1982

CERTIFICATE OF SERVICE

I, George W. McHenry, Jr., a member of the Bar of this Court and a counsel for Mid Louisiana Gas Company, do hereby certify that, on behalf of Mid Louisiana Gas Company, I have this day served, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, a copy of the foregoing response of Mid Louisiana Gas Company to Motion of Arizona Electric Power Cooperative, Inc. for Contemporaneous Consideration and Disposition of Petitions for Certiorari, by first class mail, postage prepaid, upon the following:

Jerome M. Feit, Solicitor
Federal Energy Regulatory
Commission
825 N. Capitol Street, N.E.
Washington, D.C. 20426

Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

John Holtzinger, Jr.
Karol Lyn Newman
Kevin J. Lipson
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Philip J. Mause
Norman A. Pedersen
Kadison, Pfaelzer, Woodard,
Quinn & Rossi
1229 19th Street, N.W.
Washington, D.C. 20036

Frank X. Kelly, Esq.
Gallagher, Boland, Meiburger
and Brosnan
821 15th Street, N.W.
Washington, D.C. 20005

Kim Martin Clark
Akin, Gump, Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Harry L. Albrecht
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

James D. McKinney
William R. Mapes
Ross, Marsh & Foster
888 16th Street, N.W.
Washington, D.C. 20006

William W. Brackett, Esq.
Terry O. Vogel, Esq.
Brackett & Collins, P.C.
1899 L Street, N.W.
Washington, D.C. 20036

Philip C. Wrangle
Southern Natural Gas Co.
Exploration and Production
Division
P. O. Box 1513
Houston, Texas 77001

C. Frank Reifsynder
Hogan & Hartson
815 Connecticut Ave., N.W.
Washington, D.C. 20006

Daniel F. Collins
William W. Brackett
Brackett & Collins, P.C.
1899 L Street, N.W.
Washington, D.C. 20005

Kansas State Corporation Commission
William T. Miller, P.C.
Miller, Balis & O'Neil, P.C.
1030 15th Street, N.W.
Washington, D.C. 20005

Jeffrey D. Komarow
Cadwalader, Wickersham & Taft
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Raymond N. Shibley
Brian D. O'Neill
LeBouef, Lamb, Leiby &
MacRae
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

William M. Lange
Michael Koenig
Colorado Interstate Gas Co.
P. O. Box 1087
Colorado Springs, CO 80944

Columbia Gas Transmission Corp.
John M. Hill
Giles D. H. Snyder
L. Micheal Bridges
P. O. Box 1273
Charleston, West Virginia 25325

United Gas Pipeline Corporation
John C. Nelson, Vice President
P. O. Box 1478
Houston, Texas 77001

Frederick Moring, Esquire
Jennifer N. Waters, Esquire
Crowell & Moring
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Neal Powers, Jr.
Butler, Binion, Rice,
Cook & Knapp
1100 Esperson Building
Houston, Texas 77002

Arnold D. Berkeley
Richard I. Chaifetz
Bruce J. Wendell
Suite 407
1925 K Street, N.W.
Washington, D.C. 20006

Richard A. Solomon
Wilner & Scheiner
1200 New Hampshire Avenue, N.W.
Suite 300
Washington, D.C. 20036

Robert R. Rodecker
General Counsel
Public Service Commission of
West Virginia
950 Kanawha Boulevard, East
Charleston, West Virginia 25301

Bruce F. Kiely
Kirk K. Van Tine
Baker & Botts
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

John F. Povilaitis
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg, PA 17120

Augustine A. Marci, Jr.
Kentucky West Virginia Gas Co.
420 Boulevard of the Allies
Pittsburg, PA 15219

F. M. Young
Young Radiator Company
2825 Four Mile Road
Racine, Wisconsin 53404

Michael A. Kelly
Chapman, Duff & Paul
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Walter G. Henderson, Sr.
El Paso Natural Gas Company
P.O. Box 1492
El Paso, Texas 79978

Robert N. Harbor
El Paso Natural Gas Company
1775 K Street, N.W.
Washington, D.C. 20006

Ronald L. Kuhn, Jr.
Southern Natural Gas Company
P.O. Box 2563
Birmingham, Alabama 35202

Ronald MacNicholas
Natural Gas Pipeline Company
of America
122 South Michigan Avenue
Chicago, Illinois 60603

Robert J. Haggerty
McGee & Ketcham
1019 19th Street, N.W.
Washington, D.C. 20036

Randolph Deutsch
California Public Utilities
Commission
350 McAllister Street
San Francisco, CA 94102

Alan J. Roth
Spiegel & McDiarmid
2600 Virginia Ave., N.W.
Washington, D.C. 20037

Phil Brown
1000 Long Boulevard
Suite 4
Lansing, Michigan 48910

L. Eugene Dickinson
Kentucky West Virginia
Gas Company
P.O. Box 1388
Ashland, Kentucky 41101

John F. Bates
Donald C. Shepler
Northwest Pipeline Corp.
P.O. Box 1526
Salt Lake City, Utah 84110

Donald J. Schellhardt
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209

J. Michel Marcoux
Buruder & Gentile
1201 Connecticut Ave., N.W.
Washington, D.C. 20036

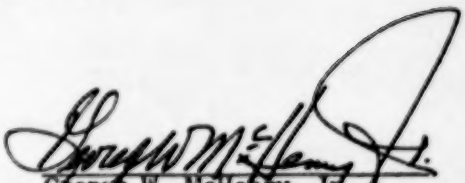
John B. Will
Northern Natural Gas Co.
2283 Dodge Street
Omaha, Nebraska 68102

Philip G. Wrengler
Exploration and Production
Division of So. Natural Gas Co.
P.O. Box 1413
Houston, Texas 77001

Donald J. MacIver, Jr.
P.O. Box 1492
El Paso, Texas 79978

C. E. Goodwin
Goodwin & Goodwin
500 Church
Repley, West Virginia 25271

Harvey Y. Morris
California State Building
Room 5066
San Francisco, CA 94102



George W. McHenry, Jr.
McHenry & Staffier, P.C.
1300 19th Street, N.W.
Washington, D.C. 20036
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